

STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

OPEN SESSION ACTION SUMMARY

Thursday, June 2, 2016 (10:00 am – 4:30 pm)

The L.A. Hotel Downtown
Angeleno Room
333 S. Figueroa Street,
Los Angeles, CA 90071

Friday, June 3, 2016 (9:00 am – 4:30 pm)

State Bar of California
845 So. Figueroa Street, 2nd Floor
Los Angeles, CA 90017

Members Present: Hon. Lee Edmon (Chair), Jeffrey Bleich (Co-Vice-Chair), Dean Zipser (Co-Vice-Chair), Danny Chou, Nanci Clinch, Joan Croker (Friday only), Daniel Eaton, James Ham, Lee Harris, Tobi Inlender (Public Member), Robert Kehr, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild (Friday only), Mark Tuft (Friday only) and Hon. Dean Stout.

Members Absent: George Cardona and Hon. Karen Clopton.

Advisors Present: Edith Matthai and Heather Rosing.

Liaisons Present: Greg Fortescue (California Supreme Court) and Jason Lee (Board of Trustees).

State Bar Staff Present: Allen Blumenthal (Office of Chief Trial Counsel), Randall Difuntorum (Office of Professional Competence), Gordon Grenier (State Bar Court), Mimi Lee (Office of Professional Competence), Erika Leighton (Office of General Counsel) and Kevin Mohr (Consultant/Reporter).

Others Present: Lauren McCurdy (State Bar), Andrew Tuft (State Bar), James Blume, Jose Castaneda, Amos Hartston (Cal. Comm'n on Access to Justice), Diane Karpman (Beverly Bar Association), Stan Lamport, Teresa Schmid (LACBA), and Neil Wertlieb (LACBA).

I. CHAIR'S REMARKS

A. Oral Report

The Chair thanked the Commission participants (Mr. Tuft, Mr. Fortescue, Prof. Mohr, and Mr. Difuntorum) who attended the Board of Trustees' May meeting to assist in the presentation of proposed amended rules 5-110 and 5-220. The Chair noted that the Board was very complimentary of the Commission and authorized the additional 45-day public comment in accordance with the Commission's recommendation.

The Chair requested and Mr. Difuntorum provided an oral report on staff's plans for the June 23rd Board presentation of the Commission's request for public comment authorization on all of

the proposed rules, including the Commission's decisions on Model Rules that are not being recommended for adoption. Mr. Difuntorum thanked the members of the Commission who had already agreed to assist in the presentation. Mr. Difuntorum also mentioned that assignments for provisional final reports had been sent to drafting teams and that the assignments for the remaining reports can be expected soon.

II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY

Approval of Action Summary – Regular Meeting on May 6 & 7, 2016 (Open Session).

The consent agenda was presented to the Commission and upon motion made, seconded and adopted, it was

RESOLVED, that the Commission approves the action summary of the Commission's May 6 & 7, 2016 meeting as amended.

All members present voted yes. The amended action summary is attached.

III. ACTION

A. Report and Recommendation on Rule 3-300 (Avoiding Interests Adverse to a Client) (including ABA Model Rule 1.8(d) (re literary rights) and 1.8(i) (re proprietary interest in cause of action))

The Chair recognized Mr. Kehr who presented the report of the drafting team. Mr. Kehr explained the drafting team's proposal that the Commission not recommend adoption of a version of either Model Rule 1.8(d) or Model Rule 1.8(i).

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 1.8(d), the Commission does not recommend adoption of ABA Model Rule 1.8(d).

All members present voted yes.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 1.8(i), the Commission does not recommend adoption of ABA Model Rule 1.8(i).

All members present voted yes.

B. Report and Recommendation on Rule 4-100 (Preserving Identify of Funds and Property of a Client) (including ABA Model Rule 1.15 (Safekeeping Property))

The Chair recognized Mr. Tuft who presented the report of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on Rule 4-100, the Commission hereby adopts the text proposed new rule 1.15 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Ms. Langford who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on Rule 4-100, the Commission hereby adopts Comment [1] to proposed new rule 1.15 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Tuft who voted no.

Following discussion, the drafting team's proposal for Comments [2] and [3] were revised. Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on Rule 4-100, the Commission hereby adopts Comments [2] and [3] to proposed new rule 1.15 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

C. Discussion of ABA Model Rules 1.10 (Imputation of Conflicts of Interest: General Rule), 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees), 1.12 (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral) and 1.8(k) (Imputation of Current Client Specific Conflicts) Neutral)

The Chair recognized Mr. Martinez who presented the report of the drafting team with proposals for new rules 1.10, 1.11, 1.12 and 1.8.11. The Chair also recognized visitors Stan Lamport and Jose Castaneda who provided oral public comment to the Commission in connection with the consideration of proposed rule 1.10. Following discussion, the proposed rules submitted by the drafting team were amended.

Rule 1.10. Separate votes were taken on the text and comments of proposed rule 1.10.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 1.10, the Commission hereby adopts the text of proposed new rule 1.10 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Ms. Inlender, Mr. Kehr and Ms. Langford who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule ABA Model Rule 1.10, the Commission hereby adopts the Comments to proposed new rule 1.10 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Rule 1.11. Separate votes were taken on the text and comments of proposed rule 1.11.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 1.11, the Commission hereby adopts the text of proposed new rule 1.11 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Ms. Inlender who abstained.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule ABA Model Rule 1.11, the Commission hereby adopts the Comments to proposed new rule 1.11 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Ms. Inlender who abstained.

Rule 1.12. Separate votes were taken on the text and comments of proposed rule 1.12.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 1.12, the Commission hereby adopts the text of proposed new rule 1.12 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Ms. Inlender who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule ABA Model Rule 1.12, the Commission hereby adopts the comments of proposed new rule 1.12 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Rule 1.8.11. A single vote was taken to adopt both the text and the one comment to proposed rule 1.8.11.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule ABA Model Rule 1.8(k), the Commission hereby adopts proposed new rule 1.8.11 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

D. Report and Recommendation on Rule 3-400 (Limiting Liability to Client) (including ABA Model Rule 1.8(h) re prohibition against limiting liability)

The Chair recognized Mr. Harris who presented the report of the drafting team. Following discussion, the proposed rule submitted by drafting team was amended. Separate votes were taken on the text and comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule 3-400, the Commission hereby adopts the text of proposed new rule 1.8.8 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule 3-400, the Commission hereby adopts the Comments to proposed new rule 1.8.8 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Ms. Langford and Mr. Martinez who voted no and Mr. Chou who abstained.

E. Report and Recommendation on Rule 3-410 (Disclosure of Professional Liability Insurance) (including ABA Model Rule 1.4(b) re duty to sufficiently explain matters to clients)

The Chair recognized Ms. Clinch who presented the report of the drafting team. Following discussion, the proposed rule submitted by drafting team was amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule 3-410, the Commission hereby adopts the text of proposed new rule 1.4.2 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Eaton, Mr. Harris, Mr. Kehr and Mr. Kornberg who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule 3-410, the Commission hereby adopts the Comments to proposed new rule 1.4.2 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

F. Report and Recommendation on Rule 3-700 (Termination of Employment) (including consideration of ABA Model Rule 1.16 (Declining or Terminating Representation))

The Chair recognized Mr. Kornberg who presented the report of the drafting team. The Chair also recognized visitor James Blume who provided oral public comment in connection with the consideration of rule 3-700. Following discussion, the proposed rule submitted by drafting team was amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule 3-700, the Commission hereby adopts the text of proposed new rule 1.16 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Rothschild who abstained.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule 3-700, the Commission hereby adopts the Comments to proposed new rule 1.16 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Rothschild who abstained.

G. Consideration of Possible Rule Addressing Gifts to Clients – Possible Revision to Proposed Rule 1.8.5 [4-210]

The Chair recognized Mr. Zipser who presented the report of the drafting team on a potential reconsideration of the Commission's adoption of proposed rule 1.8.5. Mr. Zipser explained that various options for addressing the issue of lawyer gifts to clients were considered but ultimately the drafting team decided against any of the options. In addition, in the course of the drafting team's discussions, a few minor, non-substantive corrections were identified (e.g., insertion of "and" after semicolon in subparagraph (b)(3) and a period in the place of the semicolon at end of subparagraph (b)(4)) and there was no opposition to directing staff to make these changes.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission does not recommend adoption of a provision on lawyer gifts to clients in connection with proposed rule 1.8.5 or otherwise.

All members voted yes with the exception of Ms. Langford who voted no.

H. Consideration of Alternatives for Promoting/Encouraging Pro Bono Service – Possible Revision to Proposed Rule 1.0 [1-100]

The Chair recognized Mr. Rothschild who presented the report of the drafting team on a potential reconsideration of the Commission's adoption of proposed rule 1.0 that would modify the rule to include a revised Comment [5] describing voluntary pro bono legal services as a special responsibility of lawyers as officers of the legal system. Following discussion, the proposed new comment submitted by drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission reconsiders the prior adoption of proposed rule 1.0; and it is

FURTHER RESOLVED, that the Commission adopts proposed rule 1.0 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members voted yes with the exception of Ms. Eaton who abstained. Mr. Eaton asked that his email opposing this change be treated as a written dissent to the Commission's action.

I. Report and Recommendation on ABA Model Rule 1.18 (Duties to Prospective Clients)

The Chair recognized Mr. Zipser who presented the report of the drafting team on ABA Model Rule 1.18. Following discussion, the proposed rule submitted by the drafting team was amended. A motion to adopt the proposed rule failed by a vote of: 6 yes; 8 no; and 0 abstentions.

J. Report and Recommendation on ABA Model Rule 2.3 (Evaluation for Use by Third Persons)

The Chair recognized Mr. Chou who presented the report of the drafting team on ABA Model Rule 2.3. Mr. Chou explained the drafting team's proposal that the Commission not recommend adoption of a version of Model Rule 2.3.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 2.3, the Commission does not recommend adoption of ABA Model Rule 2.3.

All members present voted yes.

K. Report and Recommendation on ABA Model Rule 3.2 (Expediting Litigation)

The Chair recognized Mr. Ham who presented the report of the drafting team on ABA Model Rule 3.2. The Chair also recognized visitors James Blume and Jose Castaneda who provided oral public comment to the Commission in connection with the consideration of proposed rule 3.2. Separate votes were taken on the text and the comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 3.2, the Commission hereby adopts the text of proposed new rule 3.2 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Kehr who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 3.2, the Commission hereby adopts the Comment to proposed new rule 3.2 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

L. Report and Recommendation on ABA Model Rule 3.9 (Advocate in Nonadjudicative Proceedings)

The Chair recognized Mr. Kehr who presented the report of the drafting team. The Chair also recognized visitor Stan Lamport who provided oral public comment to the Commission in connection with the consideration of proposed rule 3.9. Separate votes were taken on the text and comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 3.9, the Commission hereby adopts the text of proposed new rule 3.9 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 3.9, the Commission hereby adopts the Comment to proposed new rule 3.9 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

M. Report and Recommendation on ABA Model Rule 4.1 (Truthfulness in Statements to Others)

The Chair recognized Ms. Langford who presented the report of the drafting team. The Chair also recognized visitors James Blume and Jose Castaneda who provided oral public comment to the Commission in connection with the consideration of Model Rule 4.1. Following discussion, the proposed rule submitted by drafting team was amended. Separate votes were taken on the text and comments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 4.1, the Commission hereby adopts the text of proposed new rule 4.1 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Chou, Ms. Croker, Mr. Kehr, Mr. Kornberg, Ms. Langford and Mr. Martinez who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 4.1, the Commission hereby adopts the Comments to proposed new rule 4.1 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Chou, Ms. Croker, Mr. Ham, Mr. Kornberg and Ms. Langford who voted no.

N. Report and Recommendation on ABA Model Rule 4.4 (Respect for Rights of Third Persons)

The Chair recognized Mr. Martinez who presented the report of the drafting team. Mr. Martinez explained the drafting team's proposal that the Commission not recommend adoption of a version of Model Rule 4.4(a) and recommend only a version that includes Model Rule 4.4(b). Following discussion, the proposed rule submitted by the joint drafting team was amended. Separate votes were taken on the rejection of Model Rule 4.4(a) and on the text and the comments of the drafting team's proposed rule that includes only Model Rule 4.4(b).

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 4.4, the Commission does not recommend adoption of paragraph (a) of ABA Model Rule 4.4.

All members present voted yes.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 4.4, the Commission hereby adopts the text proposed new rule 4.4 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Ms. Langford who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 4.4, the Commission hereby adopts the Comment to proposed new rule 4.4 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

O. Report and Recommendation on ABA Model Rule 5.7 (Responsibilities Regarding Law-related Services)

The Chair recognized Mr. Bleich who presented the report of the drafting team on ABA Model Rule 5.7. Mr. Bleich explained the drafting team's proposal that the Commission not recommend adoption of a version of Model Rule 5.7.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 5.7, the Commission does not recommend adoption of ABA Model Rule 5.7.

All members present voted yes.

P. Report and Recommendation on ABA Model Rule 8.3 (Reporting Professional Misconduct)

The Chair recognized Ms. Croker who presented the report of the drafting team on ABA Model Rule 8.3. The Chair also recognized visitors James Blume and Jose Castaneda who provided oral public comment to the Commission in connection with the consideration of Model Rule 8.3. Ms. Croker explained the drafting team's proposal that the Commission not recommend adoption of a version of Model Rule 8.3.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on ABA Model Rule 8.3, the Commission does not recommend adoption of ABA Model Rule 8.3.

All members present voted yes except for Mr. Kehr, Mr. Kornberg, Mr. Stout and Mr. Tuft.

CLOSED SESSION

*None**

*Closed under Bus. & Prof. Code § 6026.5(a) to consult with counsel concerning pending or prospective litigation.

*Closed under Bus. & Prof. Code Sec. 6026.5(d) to consider a personnel matter.

**Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)**

- (a) All funds received or held by a lawyer or law firm* for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account" or words of similar import, maintained in the State of California, or, with written* consent of the client, in any other jurisdiction where there is a substantial* relationship between the client or the client's business and the other jurisdiction.
- (b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:
 - (1) The lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed, and
 - (2) The client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.
- (c) Funds belonging to the lawyer or the law firm* shall not be deposited or otherwise commingled with funds held in a trust account except:
 - (1) funds reasonably* sufficient to pay bank charges.
 - (2) funds belonging in part to a client or other person* and in part presently or potentially to the lawyer or the law firm,* in which case the portion belonging to the lawyer or law firm* must be withdrawn at the earliest reasonable* time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.
- (d) A lawyer shall:
 - (1) promptly notify a client or other person* of the receipt of funds, securities, or other property in which the lawyer knows* or reasonably should know* the client or other person* has an interest;
 - (2) identify and label securities and properties of a client or other person* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
 - (3) maintain complete records of all funds, securities, and other property of a client or other person* coming into the possession of the lawyer or law firm;*
 - (4) promptly account in writing* to the client or other person* for whom the lawyer holds funds or property;

- (5) preserve records of all funds and property held by a lawyer or law firm* under this Rule for a period of no less than five years after final appropriate distribution of such funds or property;
 - (6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.
 - (7) promptly distribute, as requested by the client or other person,* any undisputed funds or property in the possession of the lawyer or law firm* that the client or other person* is entitled to receive.
- (e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers and law firms* in accordance with subparagraph(d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Standards:

Pursuant to this Rule, the Board of Trustees of the State Bar adopted the following standards, effective _____, as to what "records" shall be maintained by lawyers and law firms* in accordance with subparagraph (d)(3).

- (1) A lawyer shall, from the date of receipt of funds of the client or other person* through the period ending five years from the date of appropriate disbursement of such funds, maintain:
 - (a) a written* ledger for each client or other person* on whose behalf funds are held that sets forth:
 - (i) the name of such client or other person,
 - (ii) the date, amount and source of all funds received on behalf of such client or other person,
 - (iii) the date, amount, payee and purpose of each disbursement made on behalf of such client or other person,* and
 - (iv) the current balance for such client or other person;
 - (b) a written* journal for each bank account that sets forth:
 - (i) the name of such account,
 - (ii) the date, amount and client affected by each debit and credit, and
 - (iii) the current balance in such account;
 - (c) all bank statements and cancelled checks for each bank account; and
 - (d) each monthly reconciliation (balancing) of (a), (b), and (c).
- (2) A lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client or other person* through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written* journal that specifies:
 - (a) each item of security and property held;

- (b) the person* on whose behalf the security or property is held;
- (c) the date of receipt of the security or property;
- (d) the date of distribution of the security or property; and
- (e) person* to whom the security or property was distributed.

Comment

[1] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person* other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person* and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665]. However, civil liability by itself does not establish a violation of this Rule. Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] (“When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.”) and *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] (lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds).

[2] As used in this Rule, “advances for fees” means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client’s behalf. With respect to the difference between a true retainer and a flat fee, which is one type of advance fee, see Rule 1.5(d) and (e). Subject to Rule 1.5, a lawyer or law firm* may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

[3] Absent written* disclosure and the client’s agreement in a writing* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer’s trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer’s obligations under paragraph (d) or the lawyer’s burden to establish that the fee has been earned.

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

- (a) While lawyers are associated in a firm,* none of them shall knowingly* represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
 - (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm;* or
 - (2) the prohibition is based upon Rule 1.9(a), (b), or (c)(3) and arises out of the prohibited lawyer's association with a prior firm,* and
 - (i) the prohibited lawyer did not substantially participate in the same or a substantially related matter;
 - (ii) the prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (iii) written* notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; and an agreement by the firm* to respond promptly to any written* inquiries or objections by the former client about the screening procedures.
- (b) When a lawyer has terminated an association with a firm,* the firm* is not prohibited from thereafter representing a person* with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm,* unless:
 - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm* has information protected by Rules 1.6, 1.9(c), and Business and Professions Code § 6068(e) that is material to the matter.
- (c) A prohibition under this Rule may be waived by each affected client under the conditions stated in Rule 1.7.
- (d) The imputation of a conflict of interest to lawyers associated in a firm* with former or current government lawyers is governed by Rule 1.11.

Comment

[1] Paragraph (a) does not prohibit representation by others in the law firm* where the person* prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person* became a lawyer, for example, work that the person* did as a law student. Such persons,* however, ordinarily must be screened* from any personal participation in the matter. See Rules 1.0.1(k) and 5.3.

[2] Paragraph (a)(2)(ii) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

[3] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through 1.8.9, Rule 1.8.11, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm* with the personally prohibited lawyer.

[4] The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.

[5] Standards for disqualification, and whether in a particular matter (1) a lawyer's conflict will be imputed to other lawyers in the same firm* or (2) the use of a timely screen is effective to avoid that imputation, are also the subject of statutes and case law. See, e.g., Code of Civil Procedure § 128(a)(5); Penal Code § 1424; *In re Charlisse C.* (2008) 45 Cal.4th 145 [84 Cal.Rptr.3d 597]; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 [45 Cal.Rptr.3d 464].

**Rule 1.11 Special Conflicts of Interest for Former and Current Government
Officials and Employees
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)**

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public official or employee of the government:
 - (1) is subject to Rule 1.9(c); and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated substantially as a public official or employee, unless the appropriate government agency gives its informed written consent* to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).

- (b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter unless:
 - (1) the personally prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written* notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule

- (c) Except as law may otherwise expressly permit, a lawyer who was a public official or employee and, during that employment, acquired information that the lawyer knows* is confidential government information about a person,* may not represent a private client whose interests are adverse to that person* in a matter in which the information could be used to the material disadvantage of that person.* As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] from any participation in the matter and is apportioned no part of the fee therefrom.

- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public official or employee:
 - (1) is subject to Rules 1.7 and 1.9; and
 - (2) shall not:
 - (i) participate in a matter in which the lawyer participated substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent;* or

- (ii) negotiate for private employment with any person* who is involved as a party, or as a lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- (e) As used in this Rule, the term “matter” includes:
 - (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
 - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

[1] Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.

[2] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client.

[3] By requiring a former government lawyer to comply with Rule 1.9(c), paragraph (a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. This provision applies regardless of whether the lawyer was working in a “legal” capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by paragraph (a)(1).

[4] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because conflicts of interest are governed by paragraphs (a) and (b), the latter agency is required to screen the lawyer. Whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [6]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].

[6] Paragraphs (b) and (c) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer’s compensation to the fee in the matter in which the lawyer is disqualified.

[7] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[8] A lawyer serving as a public official or employee of the government may participate in a matter in which the lawyer participated substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent* as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent* as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).

[9] This Rule is not intended to address whether in a particular matter: (i) a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency or (ii) the use of a timely screen will avoid that imputation. The imputation and screening rules for lawyers moving from private practice into government service under paragraph (d) are left to be addressed by case law and its development. See *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th at 847, 851-54 and *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27 [18 Cal.Rptr.3d 403]. Regarding the standards for recusals of prosecutors in criminal matters, see Penal Code § 1424; *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706, 711-20 [76 Cal.Rptr.3d 250]; and *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727-35 [76 Cal.Rptr.3d 264]. Concerning prohibitions against former prosecutors participating in matters in which they served or participated in as prosecutor, see, e.g., Business and Professions Code § 6131 and 18 U.S.C. § 207(a).

**Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)**

- (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated substantially as a judge or other adjudicative officer, judicial staff attorney or law clerk to such a person* or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.*
- (b) A lawyer shall not participate in discussions regarding prospective employment with any person* who is involved as a party or as lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a judicial staff attorney or law clerk to a judge or other adjudicative officer may participate in discussions regarding prospective employment with a party, or with a lawyer or a law firm* for a party, in a matter in which the clerk is participating substantially, but only with the approval of the court.
- (c) If a lawyer is prohibited from representation by paragraph (a), but not by virtue of previous service as a mediator or settlement judge, no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in the matter unless:
 - (1) the prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written* notice is promptly given to the parties and any appropriate tribunal* to enable them to ascertain compliance with the provisions of this Rule.
- (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] For purposes of this Rule, the term “substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, or acquire material confidential information. The fact that a former judge exercised administrative responsibility in a court also does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. The term “adjudicative officer” includes such officials as judges pro tempore, referees and special masters.

[2] Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Paragraph (c)(1) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

**Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)**

While lawyers are associated in a law firm,* a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

Comment

A prohibition on conduct by an individual lawyer in Rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm* with the personally prohibited lawyer. For example, one lawyer in a law firm* may not enter into a business transaction with a client of another lawyer associated in the law firm* without complying with Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This Rule does not apply to Rule 1.8.10 since the prohibition in that Rule is personal and is not applied to associated lawyers.

Rule 1.8.8 [3-400] Limiting Liability to Client
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

A lawyer shall not:

- (a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or
- (b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:
 - (1) represented by an independent lawyer concerning the settlement; or
 - (2) advised in writing* by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and given a reasonable* opportunity to seek that advice.

Comment

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably* limiting the scope of the lawyer's representation. See Rule 1.2(b).

**Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)**

- (a) A lawyer who knows* or reasonably should know* that the lawyer does not have professional liability insurance shall inform a client in writing,* at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance.
- (b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing* within thirty days of the date the lawyer knows* or reasonably should know* that the lawyer no longer has professional liability insurance during the representation of the client.
- (c) This Rule does not apply to:
 - (1) a lawyer who knows* or reasonably should know* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);
 - (2) a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;
 - (3) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client;
 - (4) a lawyer who has previously advised the client in writing* under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

Comment

[1] The disclosure obligation imposed by Paragraph (a) applies with respect to new clients and new engagements with returning clients.

[2] A lawyer may use the following language in making the disclosure required by paragraph (a), and may include that language in a written* fee agreement with the client or in a separate writing:

“Pursuant to California Rule of Professional Conduct 1.4.2, I am informing you in writing that I do not have professional liability insurance.”

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

“Pursuant to California Rule of Professional Conduct 1.4.2, I am informing you in writing that I no longer have professional liability insurance.”

[4] The exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and does not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know whether the lawyer is or is not covered by professional liability insurance.

Rule 1.16 [3-700] Declining Or Terminating Representation
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the lawyer knows* or reasonably should know* that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;
 - (2) the lawyer knows* or reasonably should know* that the representation will result in violation of these Rules or of the State Bar Act;
 - (3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or
 - (4) the client discharges the lawyer.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
 - (2) the client either seeks to pursue a criminal or fraudulent* course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes* was a crime or fraud;*
 - (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;*
 - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively;
 - (5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
 - (6) the client knowingly* and freely assents to termination of the representation;
 - (7) the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;
 - (8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

- (9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or
 - (10) the lawyer believes* in good faith, in a proceeding pending before a tribunal,* that the tribunal* will find the existence of other good cause for withdrawal.
- (c) If permission for termination of a representation is required by the rules of a tribunal,* a lawyer shall not terminate a representation before that tribunal* without its permission.
- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable* steps to avoid reasonably* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (e) Upon the termination of a representation for any reason:
- (1) subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. “Client materials and property” includes correspondence, pleadings, deposition transcripts, experts’ reports and other writings,* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably* necessary to the client’s representation, whether the client has paid for them or not; and
 - (2) the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Comment

[1] This Rule applies, without limitation, to a sale of a law practice under Rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7, but that conflict might not arise in other representations of the client.

[3] Lawyers must comply with their obligations to their clients under Rule 1.6 and Business and Professions Code § 6068(e), and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code §§ 6068(b) and 6103. This duty applies even if the

lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[4] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. See, e.g., Penal Code §§ 1054.2 and 1054.10.

[5] Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client

(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm* will pay the personal or business expenses of a prospective or existing client.
- (b) Notwithstanding paragraph (a), a lawyer may:
 - (1) pay or agree to pay such expenses to third persons,* from funds collected or to be collected for the client as a result of the representation, with the consent of the client;
 - (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written* promise to repay the loan, provided the lawyer complies with Rules 1.7(b) and 1.8.1 before making the loan or agreeing to do so;
 - (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; and
 - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent or pro bono client in a matter in which the lawyer represents the client.
- (c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation, including court costs, and reasonable* expenses in preparing for litigation or in providing other legal services to the client.
- (d) Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9.

Rule 3.2 Delay of Litigation
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

In representing a client, a lawyer shall not use means that have no substantial* purpose other than to delay or prolong the proceeding or to cause needless expense.

Comment

See Rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence and Rule 3.1(b) with respect to a lawyer's representation of a defendant in a criminal proceeding. See also Business and Professions Code § 6128(b).

Rule 3.9 Advocate in Nonadjudicative Proceedings
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

Comment

This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. This Rule also does not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4. This Rule does not require a lawyer to disclose a client's identity.

Rule 4.1 Truthfulness in Statements to Others
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

In the course of representing a client a lawyer shall not knowingly:*

- (a) make a false statement of material fact or law to a third person;* or
- (b) fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a criminal or fraudulent* act by a client, unless disclosure is prohibited by Rule 1.6 or Business and Professions Code § 6068(e)(1).

Comment

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this Rule, lawyers remain bound by Rule 8.4 and Business and Professions Code § 6106.

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.*

[3] Under Rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows* is criminal or fraudulent.* See Rule 1.4(a)(5) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud* by withdrawing from the representation in compliance with Rule 1.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

Rule 1.0 [1-100] Purpose and Function of the Rules of Professional Conduct
(Commission’s Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)
(a) Purpose.

The following rules are intended to regulate professional conduct of lawyers through discipline. They have been adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code §§ 6076 and 6077 to protect the public, the courts, and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession. These Rules together with any standards adopted by the Board of Trustees pursuant to these Rules shall be binding upon all lawyers.

(b) Function.

- (1) A willful violation of any of these rules is a basis for discipline.
- (2) The prohibition of certain conduct in these rules is not exclusive. Lawyers are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts.
- (3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these Rules or the Comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

(c) Purpose of Comments.

The comments are not a basis for imposing discipline but are intended only to provide guidance for interpreting and practicing in compliance with the Rules.

(d) These Rules may be cited and referred to as the “California Rules of Professional Conduct.”

Comment

[1] The Rules of Professional Conduct are intended to establish the standards for lawyers for purposes of discipline. See *Ames v. State Bar* (1973) 8 Cal.3d 910, 917 [106 Cal.Rptr. 489]. Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. *Id.*; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571]. A violation of a rule may have other non-disciplinary consequences. See e.g., *Fletcher v. Davis* (2004) 33 Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement).

[2] While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity.

[3] A willful violation of a rule does not require that the lawyer intend to violate the rule. *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code § 6077.

[4] In addition to the sources of guidance identified in paragraph (b)(2), opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

[5] The disciplinary standards created by these Rules are not intended to address all aspects of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons* who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility, every lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial* majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. See Business and Professions Code § 6073 (financial support for programs providing pro bono legal services).

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

A lawyer who receives a writing* relating to the representation of the lawyer's client and knows* or reasonably should know* that the writing* is privileged or subject to the work product doctrine, where it is reasonably* apparent that the writing* was inadvertently sent or produced, shall promptly notify the sender.

Comment

If a lawyer determines this Rule applies to a transmitted writing,* the lawyer should refrain from further examination of the writing* and either return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758]. If the sender is known* to be represented by counsel, the lawyer must communicate with the sender's counsel.

ATTACHMENT
Revised Action Summary
for the Commission's May 6 & 7, 2016 Meeting

STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

OPEN SESSION ACTION SUMMARY

Friday, May 6, 2016 (10:00 am – 4:30 pm)
Saturday, May 7, 2016 (9:00 am – 4:30 pm)

State Bar of California
180 Howard Street
Rooms 4A-C
San Francisco, CA 94105

Members Present: Hon. Lee Edmon (Chair), Jeffrey Bleich (Co-Vice-Chair), Dean Zipser (Co-Vice-Chair), George Cardona, Danny Chou, Nanci Clinch, Hon. Karen Clopton, Joan Croker, Daniel Eaton, James Ham, Lee Harris, Tobi Inlender (Public Member), Robert Kehr, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild, Hon. Dean Stout, and Mark Tuft.

Members Absent: Hon. Lee Edmon (Saturday)¹ and Lee Harris (Saturday).

Advisors Present: Wendy Chang and Edith Matthai.

Liaisons Present: Greg Fortescue (California Supreme Court) and Jason Lee (Board of Trustees).

State Bar Staff Present: Allen Blumenthal (Office of Chief Trial Counsel), Richard Chen (IT), Michael Williams (IT), Randall Difuntorum (Office of Professional Competence), Gordon Grenier (State Bar Court), Mimi Lee (Office of Professional Competence), Erika Leighton (Office of General Counsel), Kevin Mohr (Consultant/Reporter) and Andrew Tuft (Office of Professional Competence).

Others Present: Elliot Bien, Stan Lamport and Diane Karpman.

I. CHAIR'S REMARKS

The Chair requested and Mr. Difuntorum provided an oral report on the Commission's planned presentations at the Board of Trustee's May 13, 2016 meeting of: (1) executive summaries of selected rules (1.7, 1.8.10, 8.4, 8.4.1 and 7.1 - 75); and (2) the Commission's request for an additional 45-day public comment on proposed amended rules 5-110 and 5-220. Mr. Difuntorum also indicated that assignments would be forthcoming to conform a drafting team's initial report and recommendation to the action subsequently taken by the Commission.

¹ On Saturday, May 7, 2016, the Commission vice-chairs presided over the meeting with the meeting chaired by Mr. Bleich in morning session and Mr. Zipser in the afternoon session.

The Chair informed the Commission that the Commission's June meeting would be the last meeting prior to the anticipated submission of all of the Commission's proposed rules to the Board for public comment authorization. The Chair encouraged Commission members to send emails to staff with input on the agenda items once the June agenda is posted. By sending emails that are collected and posted as supplemental agenda materials, drafting teams are well-equipped to prepare for the meeting and optimize the Commission's deliberations.

II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY

Approval of Action Summary - Regular Meeting on March 31 & April 1, 2016 (Open Session).

The Chair granted Mr. Eaton's request that the draft action summary be discussed rather than approved on consent. Mr. Eaton recommended that a revision be considered to correct the reporting of one of the Commission's votes (the consideration of item III.A proposed amended rule 5-110). Staff revised the action summary, presented it to the Commission and upon motion made, seconded and adopted, it was

RESOLVED, that the Commission approves the action summary of the Commission's March 31 & April 1, 2016 meeting.

All members present voted yes. (A copy of the action summary as revised at the meeting is attached.)

III. ACTION

a. Report and Recommendation on Rule 3-310 (Avoiding the Representation of Adverse Interests) (ABA Model Rule 1.9 (Duties to Former Clients))

The Chair recognized Mr. Martinez who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts the text of proposed new rule 1.9 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Ms. Langford and Mr. Tuft who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the joint drafting team, the Commission hereby adopts the Comments to proposed new rule 1.9 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Ms. Langford and Mr. Tuft who voted no.

b. Report and Recommendation on Rule 3-300 (Avoiding Interests Adverse to a Client) (including ABA Model Rules 1.8(d) & 1.8(i) (Conflict of Interest: Current Clients: Specific Rules))

The Chair recognized Mr. Kehr who provided the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed amended rule 3-300 (1.8.1) of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Tuft who voted no.

The consideration of Model Rule 1.8(d) and 1.8(i) was not called for discussion.

c. Report and Recommendation on Rule 4-100 (Preserving Identify of Funds and Property of a Client) (including ABA Model Rule 1.15 (Safekeeping Property))

The Chair recognized Mr. Tuft who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended. A vote was taken on the text of the revised rule (including the recordkeeping standards) subject to consideration of proposed comments postponed until the next meeting and without prejudice to consideration of further amendments on the issue of fees paid in advance. Consideration of comments was postponed to give the drafting team an opportunity to prepare comments that conform to the revised text of the proposed rule.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed amended rule 4-100 (1.15) of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Regarding the drafting team's policy recommendation on the regulation of fees paid in advance, a recommendation was made that the Commission direct the drafting team to prepare amendments to the proposed rule that would generally require that fees paid in advance be held in trust.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby directs the drafting team to prepare further amendments to proposed amended rule 4-100 (1.15) of the Rules of Professional Conduct of the State Bar of California that would generally require a lawyer to hold advance fees in trust.

The resolution passed with eight members present voting yes (Mr. Cardona, Ms. Clinch, Ms. Croker, Mr. Eaton, Ms. Inlender, Mr. Rothschild, Judge Stout and Mr. Tuft), and seven

members voting no (Mr. Zipser, Mr. Chou, Mr. Ham, Mr. Kehr, Mr. Kornberg, Ms. Langford and Mr. Martinez)..

d. Report and Recommendation on Rule 5-100 (Threatening Criminal, Administrative, or Disciplinary Charges) (including ABA Model Rule 3.10 (Practice of Law))

The Chair recognized Mr. Zipser who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed amended rule 5-100 (3.10) of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Cardona, Ms. Croker, Mr. Kehr, Ms. Langford and Mr. Tuft who voted no.

e. Report and Recommendation on Rule 5-120 (Trial Publicity) (including ABA Model Rule 3.6 (Trial Publicity))

The Chair recognized Judge Clopton who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts the text of proposed amended rule 5-120 (3.6) of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Ms. Croker and Mr. Rothschild who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the joint drafting team, the Commission hereby adopts the Comments to proposed amended rule 5-120 (3.6) of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

f. Report and Recommendation on Rule 5-210 (Member as Witness) (including ABA Model Rule 3.7 (Lawyer as Witness))

The Chair recognized Mr. Cardona who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed amended rule 5-210 (3.7) of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

g. Report and Recommendation on Rule 5-200(A-D) (Trial Conduct) (including ABA Model Rule 3.3 (Candor Toward the Tribunal))

The Chair recognized Elliot Bien who presented a request that the Commission include amendments to the proposed candor or misconduct rules that would prohibit plagiarism by lawyers. Mr. Bien referred to previously submitted draft rule amendment language that was posted with the Commission's online agenda materials. The Commission discussed the issues presented and the Chair thanked Mr. Bien for his presentation.

The Chair recognized Mr. Tuft who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed amended rule 5-200 (3.3) of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Chou, Judge Clopton, Mr. Kehr, Mr. Kornberg, Ms. Langford and Mr. Martinez who voted no.

h. Report and Recommendation on Rules 5-200(E) (Trial Conduct), 5-220 (Suppression of Evidence), and 5-310 (Prohibited Contact With Witnesses) (including ABA Model Rule 3.4 (Fairness to Opposing Party and Counsel))

The Chair recognized Ms. Croker who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 3.4 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Kehr who voted no.

i. Report and Recommendation on Rules 5-300 (Contact With Officials) and 5-320 (Contact With Jurors) (including ABA Model Rule 3.5 (Impartiality And Decorum Of The Tribunal))

The Chair recognized Judge Stout who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was

amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts the text of proposed new rule 3.5 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Kehr who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the joint drafting team, the Commission hereby adopts the Comments to proposed new rule 3.5 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

j. Discussion of ABA Model Rules 1.10 (Imputation of Conflicts of Interest: General Rule), 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees), and 1.12 (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral)

The Chair recognized Stanley Lamport who presented his views on whether disciplinary rules ought to permit unconsented screens to rebut imputation. The Commission discussed the issues presented and the Chair thanked Mr. Lamport for his comments.

The Chair recognized Mr. Martinez who presented the report and recommendation of the drafting team and Prof. Mohr who provided background on the ABA's consideration of imputation and screening.

Following discussion, a recommendation was made that the Chair take consensus votes on the essential issues of imputation and screening to give direction to the drafting team. The Chair agreed and a vote of 15 yes, 0 no and 0 abstentions indicated a strong consensus in favor of a disciplinary rule on imputation. A vote of 8 yes (Mr. Zipser, Mr. Cardona, Mr. Chou, Ms. Clinch, Judge Clopton, Ms. Croker, Mr. Ham and Mr. Martinez), 7 no (Mr. Eaton, Ms. Inlander, Mr. Kehr, Mr. Kornberg, Ms. Langford, Mr. Rothschild and Mr. Tuft) and 1 abstention (Judge Stout) indicated a majority of the members present in favor of a disciplinary rule permitting broad screening. The drafting team was asked to prepare draft rules in accordance with the sense of the Commission for consideration at the June meeting.

CLOSED SESSION

*None**

*Closed under Bus. & Prof. Code § 6026.5(a) to consult with counsel concerning pending or prospective litigation.

*Closed under Bus. & Prof. Code Sec. 6026.5(d) to consider a personnel matter.

**Rule 1.8.1 Business Transactions with a Client and
Pecuniary Interests Adverse to a Client**
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- (a) The transaction or acquisition and its terms are fair and reasonable to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing to the client in a manner that would reasonably have been understood by the client;
- (b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
- (c) The client thereafter provides informed written consent to the terms of the transaction or the terms of the acquisition, and the lawyer's role.

Comment

[1] This Rule does not apply to the provisions of an agreement between a lawyer and client relating to the lawyer's hiring or compensation unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this Rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. See *Fletcher v. Davis* (2004) 33 Cal. 4th 61, 68 [14 Cal.Rptr.3d 58]. See also Business and Professions Code § 6175.3 (Sale of financial products to elder or dependent adult clients; Disclosure) and Family Code §§ 2033-2034 (Attorney lien on community real property). However, this Rule does not apply to a charging lien given to secure payment of a contingency fee. See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal. App.4th 38.

[2] For purposes of this Rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition, and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

[4] This Rule does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by Rules 1.5 and 1.15.

[5] This Rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person to the general public or a significant portion thereof; or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.

Rule 1.9 Duties To Former Clients
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
- (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;
- unless the former client gives informed written consent.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
- (1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;
 - (2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client; or
 - (3) without the informed written consent of the former client, accept representation adverse to the former client where, by virtue of the representation of the former client, the lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the representation.

Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131. These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Rules 1.6, 1.9(c), and Business and

Professions Code § 6068(e). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. [See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.]

[3] The fact that information can be discovered in a public record does not, by itself, render that information generally known under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[4] With regard to the effectiveness of an advance consent, see Comment [8] to Rule 1.7. [With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.] [Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.]

Rule 3.3 Candor Toward The Tribunal
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or misquote to a tribunal the language of a book, statute, decision or other authority; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Rule 1.6 and Business and Professions Code § 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in a proceeding before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.
- (d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer in proceedings of a tribunal, including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to

dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

Remedial Measures

[5] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See, e.g., Rules 1.2.1, 1.4(b)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Rule 1.6 and Business and Professions Code § 6068(e).

Duration of Obligation

[6] A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. This Rule does not apply when a lawyer comes to know of a violation of paragraph (b) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

Withdrawal

[7] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. A lawyer must comply with Rule 1.6 and Business and Professions Code § 6068(e) with respect to a request to withdraw that is premised on a client's misconduct.

Rule 3.4 Fairness to Opposing Party and Counsel
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably incurred by a witness in attending or testifying;
 - (2) reasonable compensation to a witness for loss of time in attending or testifying; or
 - (3) a reasonable fee for the professional services of an expert witness;
- (e) advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;
- (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or
- (g) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.

Rule 3.5 Contact With Judges, Officials, Employees and Jurors
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) Except as permitted by an applicable code of judicial ethics, code of judicial conduct, or standards governing employees of a tribunal, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal. This Rule does not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless authorized to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal, or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:
 - (1) in open court; or
 - (2) with the consent of all other counsel in the matter; or
 - (3) in the presence of all other counsel in the matter; or
 - (4) in writing with a copy thereof furnished to all other counsel in the matter; or
 - (5) in ex parte matters.
- (c) As used in this Rule, “judge” and “judicial officer” shall also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; and (iv) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows to be a member of the venire from which the jury will be selected for trial of that case.
- (e) During trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (f) During trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows is a juror in the case.
- (g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate;
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
 - (4) the communication is intended to influence the juror’s actions in future jury service.
- (h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.

- (i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.
- (j) A lawyer shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.
- (k) This Rule does not prohibit a lawyer from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
- (l) For purposes of this Rule, “juror” means any empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this Rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 U.S.C. § 7353 (Gifts to Federal employees).

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure § 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Rule 3.6 Trial Publicity
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), but only to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e), lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - [(i) the identity, general area of residence, and occupation of the accused;]
 - (ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (iii) the fact, time, and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] Whether an extrajudicial statement violates this Rule depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the lawyer knows is false, deceptive, or the use of which would violate Business and Professions Code § 6068(d) or Rule 3.3; (3)

whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality, for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Rule 3.4(f) and Business and Professions Code § 6068(a), which require compliance with such obligations); and (4) the timing of the statement.

[2] This Rule applies to prosecutors and criminal defense counsel. See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.7 Lawyer as Witness
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:
- (1) the lawyer's testimony relates to an uncontested issue or matter;
 - (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
 - (3) the lawyer has obtained informed written consent from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] This Rule applies to a trial before a jury, judge, administrative law judge or arbitrator. This Rule does not apply to other adversarial proceedings. This Rule also does not apply in non-adversarial proceedings, as where a lawyer testifies on behalf of a client in a hearing before a legislative body.

[2] A lawyer's obligation to obtain informed written consent may be satisfied when the lawyer makes the required disclosure, and the client gives informed consent, on the record in court before a licensed court reporter or court recorder who prepares a transcript or recording of the disclosure and consent. See definition of "written" in Rule 1.0.1(n).

[3] Notwithstanding a client's informed written consent, courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced. See, e.g., *Lyle v. Superior Court*, 122 Cal.App.3d 470 (1981).

Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (b) As used in paragraph (a) of this Rule, the term “administrative charges” means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.
- (c) As used in this Rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more persons under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Comment

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] This Rule does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr. 670]. A statement that the lawyer will pursue “all available legal remedies,” or words of similar import, does not by itself violate this Rule.

[3] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code §§ 1377-78.

[4] This Rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. See Rule 3.8.

[5] As used in paragraph (b), “governmental organizations” includes any federal, state, local, and foreign governmental organizations. Paragraph (b) exempts the threat of filing an administrative charge that is a prerequisite to filing a civil complaint on the same transaction or occurrence.